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9 *Attorneys for Debtor*

10 **IN THE UNITED STATES BANKRUPTCY COURT**
11 **FOR THE DISTRICT OF ARIZONA**

12 In Re:

Chapter 11

13 DM2 Enterprises, L.L.C.,

Case No. 2:11-bk-19817-GBN

14 Debtor.

**OBJECTION TO PROOF OF
CLAIM #3 FILED BY
CITY OF MESA**

15 COME NOWS the above-named debtor, by and through counsel, Kyle A. Kinney,
16 pursuant to Rule 3007 of the Rules of Bankruptcy Procedure and files this objection to the
17 claim filed by the City of Mesa at Claim #3 and in support hereof would show the
18 following:

19 1. This case was commenced by the filing of a petition with the Clerk of this
20 court on July 12, 2011.

21 2. On or about August 22, 2011, City of Mesa ("Creditor" or "City") filed a
22 purported proof of claim in the secured amount of \$10,170.09 with a secured status.

23 3. The Creditor's claim is based upon a "sales tax" relating to rental income
24 allegedly received by DM2 Enterprises, LLC ("DM2" or "Debtor") from its tenant, DM
25 Automotive, LLC ("Tenant"). The claim form and attached documents do not satisfy the
26 mandatory requirements of FRBP 3001(c). The Proof of Claim was not executed and filed
27 in accordance with Rule 3001(c). Creditor's claim lacks prima facie validity.

28 4. The claim does not satisfy the requirements as set forth in 11 U.S.C. §
502(b)(1) as it is unenforceable for the reasons stated below.

1 **BACKGROUND**

2 5. The basis for City's proof of claim is a city of Mesa ordinance, believed to be
3 Section 5-10-445 that requires lessors to pay rental income obtained from lessees of
4 commercial buildings. However, in this case, Debtor (lessor) never collected a rent or lease
5 payment from Tenant, as City alleges. Instead, Tenant would make mortgage payments
6 directly to Zions First National Bank (the "1st Position Lien") and to the servicer for a Small
7 Business Association Loan (the "2nd Position Lien"). There was no rent for City to tax.

8 6. Next, City does not describe how they arrived at the rental amount for which
9 to impose their tax. City simply uses a baseless arbitrary figure and fails to show any due
10 diligence as to how City arrived at such a figure. Furthermore, City fails to identify an
11 individual (or individuals) who came up with the number for the Debtor to depose.

12 7. Moreover, Debtor is immune from paying such a tax through A.R.S. § 42-
13 6004(A)(12) as Debtor is the sole member of both Debtor and Tenant.

14 **ARGUMENT**

15 8. City cannot possibly tax rental or lease payments that were never made, and
16 even assuming *arguendo* that it could, then City has no rational basis for the "rent"
17 payment, which claims to be owed back taxes as City has failed to provide any justification
18 for the lease amount which it used.

19 9. Again, Debtor had not received rental payments until entering into a lease
20 agreement with Tenant on or about July 1, 2011.

21 10. In April, 2011, A.R.S. § 42-6004(A)(12) was enacted, which prohibits a
22 municipality, like City, from imposing a rental or "privilege" tax (as City calls it) upon a
23 corporation owned 80% or more by an individual (Debtor) who rents to another corporation
24 owned 80% or more by the same individual (Tenant). Therefore, any taxes claimed by City
25 that have accrued after April, 2011 are invalid by plan statute.

26 11. Next, while there currently is no retroactive effect for this amendment to the
27 statutes, there have continually been modifications to apply amendments retroactively for
28 other amendments to the same statute.

12. A portion of this section (A.R.S. § 42-6004) as amended by Laws 2008, Ch. 303, applies retroactively to taxable periods beginning September 1, 2006.

13. The Amendment of this section by Laws 2006, 386, was purportedly effective for taxable periods beginning from and after August 31, 2006. However, the general effective date for the Forty-Seventh legislature, Second Regular Session, was September 21, 2006.

14. Subsection A, Paragraph 10 of this section, as amended by Laws 2006, Ch. 171, applies retroactively to taxable periods beginning July 1, 1999.

15. Subsection C, Paragraph 4 of this section, as amended by Laws 1998, Ch. 272, applies retroactively to taxable years beginning April 1, 1987.

16. Since Subsection A, Paragraph 12 (the section applicable to the Debtor) was not effective until April of 2011, there remains a possibility that *even if* City could have taxed a rent that was never paid, that the section will be deemed to apply retroactively, and City will have to pay back to Debtor any funds that Debtor pays to City on the alleged debt.

CONCLUSION

17. Based on the foregoing, the Debt as City claims is invalid for three important reasons: (i) Debtor never received a rent check for City to tax; (ii) City fails to provide any sort of basis for how it arrived at a rental figure from which to tax the Debtor on; and (iii) A.R.S. § 42-6004(A)(12) bars any taxes whatsoever from April 2011 to the present, and may apply retroactively as to the entire claim. City's claim against the Debtor is invalid and baseless.

WHEREFORE, the debtor moves the Court for relief as follows:

1. That the Court strike Proof of Claim #3.
2. That the Proof of Claim be disallowed;
3. That City be precluded from filing any amended, modified or substituted claim in this case;

1 4. That the Debtor has such other and further relief as the Court may deem
2 just and proper.

3
4 RESPECTFULLY SUBMITTED this 14th day of October 2011

5 **JOHNSON FINDSEN & KINNEY, PLLC**

6
7 By: /s/Kyle A. Kinney
8 Kyle Kinney Bar No. 027189

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10 A true and accurate copy of the
11 Above stated document has been
12 sent, via first class mail, to the following
13 parties this 14th day of October, 2011

14 OFFICE OF THE U.S. TRUSTEE
15 230 NORTH FIRST AVENUE
16 SUITE 204
17 PHOENIX, AZ 85003

18 RUSSELL BROWN
19 CHAPTER 13 TRUSTEE
20 SUITE 800
21 3838 NORTH CENTRAL AVENUE
22 PHOENIX, AZ 85012-1965
23 602-277-8996

24 By: /s/KAK
25
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